

John Notman
Applicant

**Accident Compensation
Corporation**
Respondent

Before:	D J Plunkett
Counsel for the Applicant:	Self represented
Counsel for the Respondent:	F Becroft
Date of Hearing:	15 February 2016
Date of Decision:	3 March 2016

DECISION

INTRODUCTION

[1] This is an appeal by John Notman against the decision of a review officer on 16 April 2013.

[2] Mr Notman has coverage under the accident compensation scheme for an injury to a finger in 1975. Following the accident, he received earnings related compensation (ERC) during two periods and also had employment from time to time. Mr Notman also has coverage for two further accidents in 1992 and 1999.

[3] It was not until many years later, in May 2012, that Mr Notman first made a claim for retrospective ERC, backdated to the date of the accident. It was declined by the Corporation in December 2012 as there was no objective evidence to support ongoing incapacity in relation to the 1975 accident. A review was dismissed in April 2013, as the reviewer found that Mr Notman had not met the onus of establishing his claim given the lack of supporting medical evidence of incapacity.

[4] The essential issue for me is whether Mr Notman has cogent evidence of earning incapacity caused by the 1975 accident, at any time following that accident (aside from the two periods during which he received ERC).

BACKGROUND

[5] Mr Notman, who is left hand dominant, sustained a gunshot injury to his right hand on 12 April 1975 when the weapon fell apart on firing and degloved his little finger.

[6] After a period of about two months on ERC, Mr Notman returned to his employment as a stockman at the Westfield Freezing Works. However, he found that in handling animals he would often knock the stump of his little finger as it hung outwards. This would open up the wound which became infected from cattle urine and the like. He found he could not cope. He left Westfield for reasons he cannot now recall, but “personal problems” with a new supervisor was an issue.

[7] The only documentation available concerning Mr Notman’s employment at the time of the accident and subsequently, is a schedule from the Inland Revenue Department (IRD) relating to his return of income for the 1975/1976 financial year listing the following employers during the specific periods:

Employer	From	To
Westfield Freezing	1/4/1975	15/8/1975
ACC	12/4/1975	30/11/1975
NZ Forest Service	19/8/1975	29/2/1976
Elizabeth Alexander	15/2/1976	15/2/1976

[8] According to Mr Notman, he had been employed by NZ Forest Service initially as a groundsman which did not involve heavy duties, but the Service unilaterally transferred him to a slasher gang with heavy duties. Again, he found he was constantly knocking the stump, which was extremely painful.

[9] The stump was amputated on about 5 November 1975. Mr Notman was discharged from hospital on 10 November. A short period of ERC followed. The

evidence as to how long he was on ERC is inconsistent. Mr Notman thought it was two weeks. The IRD record shows it was just under one month. An internal Corporation file note (7 December 2012) recorded that it was probably two months. The IRD record shows he returned to his employment with the NZ Forest Service.

[10] Mr Notman is unclear about his employment thereafter. He had jobs from time to time, mainly casual farm work, fishing (paddle crabs) and later operating a digger. He has no records of his employment or wages or IRD returns.

[11] Seventeen years later, in October 1992, Mr Notman sustained a back injury when struck by a vehicle. This has led to ongoing back problems suffered to this day. He has been on an invalid's benefit since then. Mr Notman suffered a further accident in June 1999 when he fell onto his hip.

Medical evidence

[12] The Authority has been provided with miscellaneous Thames hospital records of the two surgeries in 1975.

[13] There are medical certificates (dated 13 and 24 April 1975) from Dr Airey, general practitioner, recording that Mr Notman was unfit for work for two weeks from those dates. There is another certificate on 4 June 1975 stating that he was fit for work.

[14] Dr Collier, psychiatrist, provided a report on 6 December 2011 concerning an independence allowance under the Accident Compensation Act 2001 ("the 2001 Act"). The doctor recorded two injuries, being the gunshot wound on 12 April 1975 and the fracture/dislocation of the right hip, upper leg and thigh in October 1992. Dr Collier noted that previous assessments of an independence allowance had found a whole person impairment of 6 percent (in 2003) and 4 percent (in 2007) by other doctors.

[15] Dr Collier acknowledged that he was doing the first assessment concerning the 1975 gunshot wound. He recorded that Mr Notman had been on an invalid's benefit since 1992 and no longer worked as a digger driver. Mr Notman told Dr Collier that he got occasional twinges of pain and loss of grip, otherwise he had been able to manage reasonably well until the injury in 1992. The psychiatrist found a whole person impairment of 17 percent, which was permanent and stable. This included a 5 percent whole person impairment as a result of his right hand

injury, since he had complete loss of his right little finger (a 10 percent hand impairment making a 5 percent whole person impairment).

[16] There is a report from Dr Newburn, neuropsychiatrist, dated 4 September 2012. Dr Newburn diagnosed a pain disorder associated with both psychological factors and Mr Notman's general medical condition, as well as a major depressive episode. He noted Mr Notman's two injuring events (1975, 1992) and found the second event to be significant. In Dr Newburn's opinion, the earlier event was not (at the time of the report) a significant contributor to Mr Notman's disability.

[17] Dr Newburn rated Mr Notman as mildly impaired in his daily living activities, mildly impaired in his social functioning, mildly impaired with respect to concentration, persistence and pace and at the boundary between moderate and marked impairment for adaptation and decompensation. As Mr Notman was in a chronic state of decompensation, he could not meet the usual commitments of home and work. He was in need of psychological assistance but was not receiving it.

[18] The psychiatrist noted that Dr Collier had given a whole person impairment rating of 17 percent. Dr Newburn agreed with this so far as physical symptoms were concerned. However, Dr Newburn found that the whole person impairment due to mental injury was 40 percent and accordingly the final whole person impairment (adding physical and mental symptoms) was 50 percent.

[19] Mr Notman's general practitioner, Dr Armstrong, provided a medical certificate on 20 November 2012 certifying that Mr Notman was unable to work, due to both the loss of his right fifth finger and the October 1992 injury. She found he was unable to hold anything firmly for any period of time with his right hand, such as a butcher's knife which was needed to skin and dress animals. She noted that in October 1992, he had sustained a further injury which had led to progressive chronic pain in his lower abdomen, upper thighs and other areas. This injury was causing significant ongoing problems. His symptoms were also highly suggestive of a chronic disc prolapse. Due to his chronic pain and inability to work independently, he was suffering from chronic depression.

[20] Another medical certificate by Dr Armstrong, also on 20 November 2012, recorded that Mr Notman was deemed unfit for work by Dr Airey in 1975 following a traumatic gunshot amputation. She noted that a medical certificate had cleared him for work on 4 June 1975. Dr Armstrong confirmed that he was not fit for work from 13 April to 4 June 1975.

[21] A further medical certificate from Dr Armstrong, also dated 20 November 2012, recorded that Mr Notman was admitted to Thames Hospital for amputation of the remaining stump on about 4 November 1975 and that he was off work following this for two months. He was then unable to return to his prior work and went on a benefit.

Accident compensation claim

[22] Mr Notman, or perhaps Dr Airey on his behalf, notified the Corporation of the April 1975 accident at about the time of the accident. He received ERC for two periods following the accident on 12 April 1975 (until 4 June 1975) and following the amputation on 5 November 1975 (for between two weeks and two months).

[23] The Corporation closed its file on 4 November 1976.

[24] On 10 May 2012, Mr Notman filed a claim with the Corporation for back dated and ongoing ERC, as a consequence of the injury on 12 April 1975. This was 37 years after the accident.

[25] The Corporation advised Mr Notman on 10 December 2012 that his claim for backdated weekly compensation was unsuccessful. The Corporation found that he was not entitled to such compensation, because he had been unable to obtain any objective clinical evidence to support ongoing incapacity in relation to his right little finger amputation.

[26] Mr Notman sought review of the Corporation's decision. There was a hearing on 13 March 2013 at which he was represented by an advocate (via teleconference). The reviewer found Mr Notman to be a credible and honest witness.

[27] The reviewer dismissed the application in a decision on 16 April 2013. He had before him a number of medical reports, including those of Dr Armstrong, Dr Collier, Dr Newburn and another psychiatrist, Dr Vickers (latter report not sent to the Authority, though I have read an extract set out in the decision of the District Court in *Notman v Accident Corporation* [2013] NZACC 397 at [25] and the summary in the reviewer's decision).

[28] The reviewer found that, given the paucity of supporting medical evidence of incapacity, he had to conclude that Mr Notman had not met the onus of establishing the claim for backdated weekly compensation. In respect of a mental

injury, it was found that he did not have any such injury arising out of the 1975 event.

[29] It is this decision which led to Mr Notman's appeal to the Authority.

CASE ON APPEAL

[30] Mr Notman originally filed this appeal in the District Court on about 29 April 2013.

[31] On 28 November 2013, the District Court issued a decision dismissing a separate appeal against the decline of an independence allowance under the 2001 Act ([2013] NZACC 397). In respect of the claim for backdated ERC, it was reserved for submissions as to the District Court's jurisdiction.

[32] Following submissions from the parties, the District Court found it did not have jurisdiction as to Mr Notman's initial entitlement. Accordingly, the claim for backdated ERC was transferred to the Authority on 26 August 2015 (*Notman v Accident Compensation Corporation* [2015] NZACC 237). The question transferred to the Authority for determination is Mr Notman's entitlement to ERC for the period from 12 April 1975 (date of accident) until 30 June 1992 (expiry of jurisdiction of Authority). The question of his entitlement from 1 July 1992 onwards was reserved for further determination by the District Court.

[33] Mr Notman was sent a number of letters by the Authority inviting him to provide evidence and submissions, but he declined to do so. However, he did attend the hearing in person and gave evidence and made submissions. His explanation for failing to respond to the Authority's letters was that he did not understand the context of the letters. The Authority also has the submissions (9 May 2013) of Mr Notman's former representative to the District Court.

[34] The Authority received submissions from the Corporation (4 February 2016). There were further submissions from the Corporation's counsel at the hearing.

THE LAW

[35] Mr Notman was injured during the currency of the Accident Compensation Act 1972 ("the 1972 Act"). Notwithstanding the repeal of the 1972 Act, the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391 of the 2001

Act). In terms of procedure, it is the appeal provisions in the Accident Corporation Act 1982 (“the 1982 Act”) that are applicable.

[36] An appeal lies to the Authority against certain decisions of a review officer (section 107 of 1982 Act). An appeal is by way of a rehearing (section 109(1) of the 1982 Act). The Authority can confirm, modify or reverse a decision, or refer the matter back to the Corporation (section 109(7) & (8)).

[37] In terms of Mr Notman’s substantive rights, it is the 1972 Act that is applicable to his initial entitlement and then the 1982 Act from 1 April 1983 (see [2015] NZACC 237 at [22], [27]-[28]).

[38] The burden is on Mr Notman to establish that he has an earning incapacity and that any incapacity is caused by the accident.

[39] Pursuant to the 1972 Act, Mr Notman must establish that “as a result of incapacity due to personal injury” he suffered “loss of earning capacity” (s 113(1) of the 1972 Act). Once his condition stabilised, an assessment of permanent incapacity would be made. In order to obtain ongoing ERC, he would have to prove himself to be a person who “does not completely recover from his incapacity due to the accident” (s 114(1) of the 1972 Act). Under the 1972 Act, he had to show “permanent loss of earning capacity (if any) due to the injury” (s 114(1)(b)).

[40] In terms of the 1982 Act, in order to obtain ERC, Mr Notman must show that “as a result of incapacity due to personal injury”, he “suffers ... temporary loss of earning capacity” (s 59(1)). Again, once his condition stabilises, an assessment of permanent incapacity is made. For the purpose of ongoing ERC, he has to prove that he is a person who “does not completely recover from his incapacity due to the accident” (s 60(1)). The Corporation would then make an assessment of the nature and extent of his permanent incapacity (s 60(1)(a)) and whether it resulted in a permanent loss or diminution of his capacity to earn (s 60(1)(b)).

[41] As the relevant provisions of the 1972 and 1982 Acts are almost identical, it does not matter which Act the analysis of Mr Notman’s entitlement to ERC is done under.

ASSESSMENT

[42] Mr Notman seeks from the Authority ERC for the period from about 12 April 1975 (date of accident/injury) to 30 June 1992 (the Authority’s jurisdiction under the 1982 Act ends). He did not make the claim for backdated ERC until May 2012,

some 37 years after the injury. He had received ERC for short periods following the accident and also following a consequential amputation in November 1975.

[43] Mr Notman's claim of permanent earning incapacity is not self-evident from the nature of the injury, being only to his right little finger. He actually returned to his job as a stockman following the accident and the circumstances surrounding his departure from Westfield are unclear. It has not been shown that it was due to the injury. He was then employed doing heavy forestry work at NZ Forest Service, though frequently and painfully knocked the outward jutting stump. The stump was then amputated. The record shows that he returned to NZ Forest Service. His employment record thereafter from March 1976 to June 1992 and even beyond, is unclear. Mr Notman has no records of his employment or remuneration.

[44] The Corporation and reviewer declined the 2012 claim for ERC because of a lack of medical evidence supporting incapacity and furthermore, that any such incapacity arose from the 1975 accident.

[45] In transferring to the Authority the determination of the question as to whether Mr Notman is entitled to ERC for the period up to 30 June 1992, the District Court provides guidance to the Authority. It was observed that the Authority would need "clear and cogent" evidence of entitlement, having regard to the importance of the decision to both Mr Notman and the Corporation and bearing in mind that his failure to make a timely application had deprived the Corporation of the opportunity to monitor the claimed entitlement over more than 35 years ([2015] NZACC 237 at [28]).

[46] At the same time, the Authority was reminded of the District Court's line of cases requiring careful scrutiny of later medical opinion formed without the benefit of contemporaneous examination and diagnosis.

[47] Mr Notman does not have any other medical evidence, particularly evidence contemporary with the relevant period from 1975 to 1992, supporting his claim to have been incapacitated as a result of the 1975 injury.

[48] I find that the contemporary medical evidence does not establish incapacity caused by the 1975 accident, in respect of the period following that accident (beyond the two periods for which he was paid ERC). That is not the fault of the Corporation. As Mr Notman did not make a claim for ERC beyond those two

confined periods, neither he nor the Corporation obtained medical evidence. It is Mr Notman who is responsible for that lack of evidence.

[49] The District Court points out that the Authority should be cautious of later medical evidence. That is particularly so when the earliest of the later evidence is dated December 2011, some 36 years after the accident. However, even this later evidence is largely unsupportive.

[50] Dr Collier noted that Mr Notman had spoken only of occasional twinges of pain and loss of grip as a result of the 1975 injury (report 6 December 2011). A 10% impairment of the hand (and 5% whole person impairment), being the non-dominant hand, does not establish earning incapacity even for a labourer.

[51] Dr Newburn, who found a much greater whole person impairment due to a mental injury, discounted the 1975 injury as being significant (report 4 September 2012). I note also that the District Court rejected Dr Newburn's opinion as to the existence of a mental injury ([2013] NZACC 397 at [27]). I respectfully agree with the finding of the District Court. The finding of a psychological condition is not supported by other psychiatrists.

[52] Mr Notman's general practitioner, Dr Armstrong, certified in November 2012 that he was then unable to work due to the loss of his finger in 1975 and the 1992 accident. She says he could not hold anything, but her certificate does not deal with his left hand dominance. I do not read her letter as certifying continuous unfitness to work since April 1975. Any such opinion would be inconsistent with the contemporary evidence (medical and employment) that exists. It is to be remembered that this certificate is 37 years after the accident and 20 years after the expiry of the period at issue here.

Conclusion

[53] I find that there is insufficient evidence of Mr Notman's incapacity to undertake his pre-accident work or work of that nature. Mr Notman has not shown that he was incapacitated to any relevant degree, nor any loss of earnings attributable to the 1975 accident. Indeed, he returned to his pre-accident work for a period, though left about two months later for unknown reasons. He later had casual forestry, farm, fishing and other jobs of a similar nature to his pre-employment work, though there are no records of this work (aside from a short IRD list).

[54] Mr Notman has not satisfied the criteria under the 1972 or 1982 Acts for ERC.

OUTCOME

[55] The appeal is dismissed and the decision of the reviewer confirmed.

[56] Costs are reserved. Either party may address this issue within 21 days of the decision. If submissions seeking costs are filed, the other party may reply within 14 days.

D J Plunkett